TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1902.

No. [illegible] 202, 43.

GEORGE C. THOMAS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 18, 1902.

(18,503.)

(18,503.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 650.

GEORGE C. THOMAS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	1
Petition for writ of error	4	2
Indictment	6	3
Demurrer	9	4
Minute entry of argument on demurrer	11	5
Opinion of Judge Thomas on demurrer	12	5
Order overruling demurrer	32	18
Order filing transcript of proceedings and evidence	34	18
Transcript of proceedings and evidence	35	18
Testimony of Thomas De W. Scoble	35	19
Government rests	38	20
Motion for verdict for defendant	38	20
Defendant's requests for instructions	38	20
Charge of the court	39	21
Motion for new trial	40	21
Motion in arrest of judgment	41	22
Agreement as to transcript	42	22
Minutes of trial, &c.	44	23
Recognizance for appearance	46	23
Assignment of errors	48	25
Bond for costs	55	28
Citation and service	57	29

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 19, 1902.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The United States, plaintiff, and George C. Thomas, defendant, a manifest error hath happened, to the great damage of the said defendant George C. Thomas, as is said and appears by his complaint: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 23rd day of April, 1902, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of March, in the year of our Lord one thousand nine hundred and two.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ in hereby allowed & proceedings for enforcing the judgment are stayed pending the hearing on the writ.

EDWARD B. THOMAS, *U. S. J.*

M'ch 25th, 1902.

2 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from four to 57 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of George C. Thomas, plaintiff in error, *vs.* The United States, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern dis-

trict of New York, in the second circuit, this first day of April, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-sixth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 [Endorsed:] E. & A. B. 1923. Supreme Court of the United States. George C. Thomas, plaintiff in error, *vs.* United States, defendant in error. Writ of error. Pavey & Moore, attorneys for plaintiff in error, 32 Nassau street, borough of Manhattan, New York city. U. S. circuit court, southern district New York. Filed Mar. 25 1902. John A. Shields, clerk. Due and timely service of a copy of the within writ of error is hereby admitted. Dated March 25, 1902. Henry L. Burnett, attorney for Uited States. 10 pd.

4 Supreme Court of the United States.

UNITED STATES *vs.* GEORGE C. THOMAS. } Petition for Writ of Error.

To the honorable the judges of the Supreme Court of the United States of America:

Comes now the above-named defendant by Pavey and Moore, his attorneys, and complains that in the rendition of the judgment against the said defendant in the above-entitled cause in the circuit court of the United States for the southern district of New York on the twelfth day of March, 1902, and in the record and proceedings had prior thereunto in this said cause, manifest error hath happened to the great damage of said defendant, all of which will more in detail appear from the assignment of errors which is filed herewith.

Wherefore, the defendant prays that a writ of error may be issued by the Supreme Court of the United States of America to the circuit court of the United States for the southern district of New York for the correction of the said certain errors so complained of, and also that a citation in due form may be issued, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States of America.

PAVEY AND MOORE,
Attorneys for Defendant and Plaintiff in Error,
32 Nassau Street, Borough of Manhattan,
New York, N. Y.

Dated, March 24th, 1902.

The foregoing petition is hereby allowed.
EDWARD B. THOMAS, *U. S. J.*

5 (Endorsed:) Supreme Court of the United States.—United States *vs.* George C. Thomas.—Petition for writ of error.—

Pavey & Moore, attorneys for George C. Thomas.—Due and timely service of a copy of the within petition is hereby admitted.—Dated March 25th, 1902, Henry L. Burnett, attorney for United States.—U. S. circuit court, southern district of New York, Filed Mar. 25, 1902, John A. Shields, clerk.

6 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the second Wednesday of October, in the year of our Lord one thousand nine hundred and one, and continued by adjournment to and including the tenth day of December, in the year of our Lord one thousand nine hundred and one.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid, on their oath present that George C. Thomas, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore to wit, on the fifteenth day of May in the year of our Lord one thousand nine hundred and one, at the southern district of New York, and within the jurisdiction of this court, being a broker doing business in the said city and county, then and there sold to one T. D. Scoble, one hundred shares of Atchison preferred stock, for the sum of nine thousand two hundred and sixty-two dollars and fifty cents, but a further or more particular description of the said shares of stock is to the jurors unknown and cannot be given in this indictment. And at the time of said sale, the said George C. Thomas made and de-
7 livered a memorandum of said sale to the said T. D. Scoble, of the tenor following, to wit:

"Stamps. NEW YORK, *May* 15, 1901.

Sold to T. D. Scoble, by Geo. C. Thomas,

100 shares of Atchison preferred at 92⅜.....$9,262.50"

and it was then and there the duty of the said George C. Thomas, the seller aforesaid, and he was required by law, then and there, to affix to and upon the said memorandum of sale, the proper revenue stamps to denote the amount of tax due to the Government of the United States at the time of said sale and the delivery of said memorandum as aforesaid and the said George C. Thomas then and there was liable to pay the tax aforesaid. And the said George C. Thomas, at the time of making the sale aforesaid and the delivery of the memorandum thereof, as aforesaid, did unlawfully and willfully make and deliver said memorandum of the said sale to the said buyer, namely, the said T. D. Scoble, without then and there having the proper stamps

affixed thereto, to denote the tax aforesaid, with intent to evade the provisions of section 25, Schedule A, (entitled "stamp taxes"), of the "Act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, in the respects hereinbefore set forth and described; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

HENRY L. BURNETT,
U. S. Attorney.

(Endorsed:) U. S. circuit court.—The United States of
8 America *vs.* George C. Thomas.—Indictment. Failure to affix revenue stamps to memorandum of sale.—Act of June 13, 1898.—Henry L. Burnett, U. S. district attorney.—A true bill, Lawrence F. Abbott, foreman.—U. S. circuit court, southern district of New York, Filed Dec. 10, 1901, John A. Shields, clerk.—Filed in open court the 10th day of December, 1901.—Dec. 11, 1901, the defendant arraigned and indct. read. Def't interposes demurrer.—1901, Dec. 24, demurrer argued, overruled, def't to plead over.—1902, Mar. 12, def't rearraigned, pleads not guilty.—March 12, 1902, the defendant tried. Verdict guilty.—Motion in arrest of judgment granted, 30 days' stay. 1902, March 12, sentence, five hundred dollars fine, to stand committed, etc. Held in $1,000 bail.

9 Circuit Court of the United States for the Southern District of New York.

UNITED STATES
vs.
GEORGE C. THOMAS. } Demurrer.

The defendant, George C. Thomas, demurs to the indictment presented by the grand jury on the 10th day of December, 1901, charging him with the crime of violating the internal-revenue laws of the United States, upon the ground that the facts alleged in said indictment do not constitute an infringement of, or a crime against the laws of the United States for the reason that the portions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898, and known as the war revenue law of 1898, upon which the said indictment is based, are unconstitutional and void because they are in violation of the Constitution of the United States, and, more particularly, in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

10 Wherefore, this defendant asks judgment that he be dismissed and discharged from the said premises specified in the said indictment.

FRANK D. PAVEY,
Of Counsel for Defendant.

PAVEY & MOORE,
Attorneys for Defendant.

Office and post-office address, 32 Nassau street, Manhattan, New York, N. Y.

(Endorsed:) Circuit court of the United States, for the southern district of New York.—United States of America *vs.* George C. Thomas.—Demurrer.—Pavey & Moore, attorneys for defendant, 32 Nassau street, New York city.—Filed in court, Dec. 11, 1901.—H. I. T. dep. cl'k.

11 TUESDAY, *December 24th*, 1901.

The court meets and is opened by proclamation.
The Honorable Edward B. Thomas, judge.

THE UNITED STATES
vs.
GEORGE C. THOMAS. } C. 2695.

The argument of a demurrer interposed to the indictment in the above cause coming on this day to be heard:
Mr. Frank D. Pavey is heard in support of demurrer, Mr. William S. Ball, assistant to U. S. attorney, opposed.
C. A. V.

12 Circuit Court of the United States for the Southern District of New York.

THE UNITED STATES
vs.
GEORGE C. THOMAS. } Jan'y 28, 1902.

Henry L. Burnett, United States attorney, and William S. Ball, assistant attorney.
Pavey & Moore, attorneys for defendant, Frank D. Pavey, of counsel.

THOMAS, *J.*:

The defendant demurs to an indictment, which charges that he, being a broker in the city of New York, sold certain shares of Atchison preferred stock, and omitted the required revenue stamps from the memorandum of sale, with intent to evade the war revenue act of 1898. The act provides:

"*Adhesive Stamps.*

SECTION 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid,

for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment or paper upon which such instrument-, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

* * * * * * *

"SCHEDULE A.

Stamp Taxes.

Bonds, debentures, or certificates of indebtedness issued after the first day of July, anno Domini eighteen hundred and ninety-eight, by any association, company, or corporation, on each hundred
13 dollars of face value or fraction thereof, five cents, and on each original issue, whether on organization or reorganization, of certificates of stock by any such association, company, or corporation, on each hundred dollars of face value or fraction thereof, five cents, and on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company or corporation, whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money, or for the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents: Provided, that in case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. And any person or persons liable to pay the tax as herein provided, or any one who acts in the matter as agent or broker for such person or persons, who shall make any such sale, or who shall in pursuance of any such sale deliver any such stock, or evidence of the sale of any such stock or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions shall be deemed guilty of a misdemeanor."

The defendant urges that the statute, so far as here involved, is unconstitutional. He premises that a certificate of stock is property;

that a tax on the sale of property is a tax on the property itself; and from this he concludes that the act provides for levying, without apportionment, a direct, and hence invalid, tax on such property.

The statute lays a stamp duty, (1) on the bonds, debentures, or certificates of indebtedness issued by any association, company, or corporation, (2) on original certificates of stock issued by any such body, (3) on all subsequent sales, or agreements to sell, or
14 memoranda of sales or deliveries or transfers of such certificates.

The present inquiry relates to a tax on a memorandum or contract of sale of a certificate of stock. What is such certificate? It is the evidence of the holder's title to shares in the property and franchises of a corporation. The sale of the certificate is a transfer of such shares to another person. The State furnishes facilities, whereby persons may form a corporation, which may designate the individual interests of its members by certificates, transferable upon its books, so as to permit the holders to manage or direct the business of the corporation, with such liability, privileges, and immunity as the charter and the law provide. Congress has declared that every person, who holds such a certificate in such artificial body, and shall transfer by sale to another the right to participate in such corporation, and to become a member thereof, with the accompanying property rights and benefits, shall pay a tax on the contract or transaction, whereby the transmission is effected. It is not intended at this time to emphasize the benefits and protection afforded by the law to the members of such bodies, and the enhanced value of their property rights by reason of the facilities afforded them. In a matter of less importance such privilege would deserve at least consideration, but the present discussion will pursue broader views and inquiries.

The defendant relies upon certain decisions of the Supreme Court, and judicial expressions in the opinions, to wit: That Congress may not levy a stamp tax on bills of lading of goods exported, Fairbanks *v.* United States, 181 U. S. 283; nor levy a license tax upon an im porter, Brown *v.* Maryland, 12 Wheat. 419; nor tax sales by auc-
15 tioneers of imported goods in the original packages, Cook *v.* Pennsylvania, 97 U. S. 566; nor lay a license tax upon goods not the product of the State but brought therein for sale, Welton *v.* Missouri, 91 U. S. 279; nor tax a bill of lading for metal shipped from a point within to a point without, the State, Almy *v.* California, 24 How. 169, 174; nor lay a license tax on drummers selling or offering for sale goods by sample and having no licensed house of business in the taxing district, Robbins *v.* Shelby County Taxing District, 120 U. S. 489.

These cases involve attempts on the part of the United States to tax exports, or of States to tax imports or exports, or to lay taxes on subjects of interstate commerce. They contain statements or holdings, that a tax on the occupation of importer or exporter is a tax on the goods imported or exported; that a tax on a bill of lading of export goods is a tax on the goods;

that a tax on a vendor of foreign goods is a tax on what he sells; that a tax upon sales of imported goods in the original packages, payment whereof is obligatory upon the auctioneer, is a tax on the goods, and, that a tax on the sale of an article, imported only for sale, is a tax on the article itself, Brown *v.* Maryland, 12 Wheat. 444. It will be observed, that in each instance the subject-matter of the tax was not within the taxing power. Hence, no tax, direct or indirect, could be laid thereon, under any disguise whatsoever. The taxation of property, other than exports, is within the power of Congress, although the tax must be raised in the manner pointed out by the Constitution, that is, "direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity." The defendant quotes with some special urgency from the opinion in Nicol *v.* Ames, 173 U. S. 519, where the following portion of the war-
16 revenue act of 1898 is construed:

"Upon each sale, agreement of sale or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent."

It was held that the tax was laid upon the facilities of the exchange and was valid. Mr. Justice Peckham in the course of the opinion said:

"A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded."

The defendant infers from this excerpt that a tax upon sales of property is a direct tax, and invalid unless apportioned. The defendant's argument, so far as based on the decisions, other than the last cited, may be tested. It is that, inasmuch as the tax on an importer, bill of lading of export goods, sales by auctioneers of imported goods for the importer, vendors of goods from beyond the taxing State, is a tax upon the goods themselves, and invalid, so a tax on transfers of property is a direct tax upon the property itself. The fallacy of this method of argument quickly appears. Thus, a license tax on the importer of tobacco is a tax on the goods imported; hence, a tax on a dealer in domestic tobacco is a direct tax on his commodity. A license tax by a State upon foreign salesmen is a tax on the subjects of their sales; hence, a Federal tax on the occupation of a salesman, in the State where he resides, is a direct tax on the goods sold by him in that State. A tax on a bill of lading of goods for export, is a tax on the goods; hence, a Federal tax on a domestic bill of lading is a direct tax on the
17 goods. Therefore, the occupations of tobacco dealers, salesmen, and transportation companies, are not subjects of an unapportioned Federal tax, and the taxes laid upon occupations, the

selling of property, and trades, found in the act of 1898 and earlier acts, are invalid. But the power of Congress to tax occupations, business, trades, transfers of property, and contracts, has long since been recognized. Railroad Co. *v.* Collector, 100 U. S. 593, 598; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 576, 577. To such consequences does the defendant's reasoning lead. Syllogisms should not be fashioned upon judicial expressions detached from the particular inquiry at some former time under consideration. The present question is, whether a statute providing for a tax on contracts for the sale, and delivery, of certificates of stock lays a direct tax upon property within the meaning of the Constitution. It is a mere truism, that a tax, whatever its form, falls primarily on the tax-payer's property, for how otherwise could it be paid? If a farmer actually pay a tax for the privilege of following his vocation, is not something exacted from his farm, stock, or other property? The same is the case, if the tax be laid on the sale of the products of the farm. If a railroad company be taxed on bills of lading, the tax, when paid, is charged to operating expenses, and the result is precisely the same as if the tax were laid upon road-bed and equipment. Yet in no one of the three cases is the tax assessed on the property, nor is the property specifically subjected to the tax. The law commands, that when the owner shall do an act, for instance the act of selling property, he personally, in the first instance, shall pay a tax. So, if a tax, measured by the proceeds of sale, be laid on the privilege of selling articles in an
18 exchange, the vendor, in case of sale, will have the precise amount of money at night, as if the tax had been laid upon the sale of property, or upon the property itself. In short, the tax, however laid, when paid, burdens the tax-payer's property. But all this does not prove that the tax is direct. A system of taxation upon the sale of property is in essential elements different from a system that lays the tax directly upon property. The latter system is certain, because the tax is sure to arise and to be paid in any event. There is but a single condition requisite to the existence and payment of such tax, and that is, the existence of the property. The statute is direct in its application, and in theory payment is inevitable, and to such payment principal and income alike are pledged. But a tax, payable on the sale of property, is contingent upon, and is laid upon, an event that may never arise, and the tax, in the meantime, is non-existant. For example, a statute providing for a direct tax on a parcel of land is, save as delayed by the acts of assessment and levy, instant in its operation, and the tax attaches as a lien upon the land, from which it may be dissociated only by payment. A statute directing a tax on contracts of sale of land is entirely executory, and may never be executed, and the estate continues in the hands of the owner, without burden or incumbrance. In the case at bar, the affixing of the stamp awaits the sale, and even then the certificate passes without disability to the transferee. Hence, no burden is laid on the certificate, nor does it ever become liable for the payment of the tax. The law simply says to the vendor, "When you do an act you

shall pay a tax." Moreover, a provision for a direct tax on land at once decreases its beneficial value, whether it
19 be kept or sold, while a tax on an instrument of conveyance or transfer, leaves the enjoyment intact. The present owner and his heirs forever may hold the profit without dimunition of profit. In the one case the State in effect seizes the land by the force of the statute, and there is no latitude, no escape from the compulsory tribute; in the other, nothing is taken away from the enjoyment of rights of ownership, save that in the event of the owner engaging in the business transaction of selling or exchanging his property, a tax must be paid thereon, taking the form of a stamp duty on the indenture, or, if it be personal property, on a bill of sale, or contract. It is simply a tax upon transactions in business activities, or forms of commercial dealings, and may be sustained on several grounds. In the first place, the statute may rest upon the power of Congress to declare that any person, who shall engage in the business, that is occupation, of buying or selling certificates of stock, shall pay a tax measured by the price realized. Is not such a statute lawful? The buying and selling of stocks, not by brokers alone, but by a large number of persons in every community who profess some other main vocation, is an occupation more or less constant. This has become a business, a vocation, and is amenable to Federal taxation as such. These persons, maybe, could not be so well reached, if the statute laid a gross duty in the form of a license tax on the individual trader in stocks. But in any case, Congress has the power to distribute such tax upon each item of business falling under the traffic. For, if it may lay a tax of one hundred dollars on the vocation of buying and selling stocks, it may lay a tax on the sale of stocks at the rate of two cents "on each hundred dollars" sold. The principle that justifies an impost of ten dollars per annum on a baker, supports the right to lay a tax of a fraction of a mill on each
20 loaf of his bread. The principle that underlies the power, and not the peculiar form of its exercise, is regarded. Therefore, it is not an answer, that the instance charged may have been the only transaction of the dealer.

How many sales of certificates are necessary to constitute the business of a vendor of certificates, five, ten, twenty, or one, and at what state of his sale will his business be sufficiently apparent to compel the dealer to stamp his transactions? At what point in his business career does the statute become constitutional? The act of 1898, like that of 1862, provides for a tax on many and varied occupations. How many items of business may a person do under each vocation, and so far forth escape the tax? How many instances of sales must the Government show against a defendant to establish the validity of the statute as to him? A tax is laid upon retail vendors of tobacco. May a person sell tobacco now and then without paying a tax? So a tax is placed upon the vendors of liquor, but may a person escape compliance with this tax upon the plea that the transaction was his first, second, or some other in numerical order, and that he did not sell liquor for a business? Is the answer that the offender never did it before a defense against

the charge of violating the revenue statute? If such be the law, a tax may not be placed upon the occupation, business, or selling, of liquors, tobacco, or stock, or any other thing consumable or non-consumable, except under the necessity, in case of attempted enforcement, of proving beyond a reasonable doubt, that the vendor had made sufficient sales, so that it may be inferred that it was his regular vocation, and that he was engaged uniformly in the business. In that case the statute would become valid or invalid as the jury might determine. The law is that he shall not pursue a cer-
21 tain business, without paying the tax, and if Congress may validly declare that, it may declare that he shall not, untaxed, do any of the business acts that fall within the occupation. A person pursues a business or vocation, whether or not he announces it as his profession. It is what he does, and not what he professes, that determines. It seems to be a political rather than a judicial function to determine what shall constitute a business.

But, it may be answered that an unapportioned tax may not be laid upon sales of property, unless the tax, in whole or part, may be shifted to another. Such rule would preclude a tax upon occupations. Aside from that consideration, the ultimate incidence of the tax has been very sparingly employed in the solution of questions similar to the one now before the court. The discussions and opinions of political economists are useful for the instruction of legislators in enacting, rather than for judges in the interpretation of statutes, and the judgments of the court have often disregarded the conclusions of the systematic writers.

For instance, Mr. McCulloch (McCulloch's Taxation, p. 181), states: "Duties on coaches, carriages, * * * fall wholly on those by whom they are used, and cannot be shifted to any one else." But the Supreme Court decided that a tax on carriages was indirect in its nature. Hylton *v.* U. S., 3 Dall. 171. In Veazie *v.* Fenno, 8 Wall. 533, it was determined that an act of Congress, which provides "that every national banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amounts of the notes of any State bank, or State banking associations, paid out by them," did not lay a direct tax within the meaning of the Constitution. Mr. Chief Justice Chase said:

22 "Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words 'direct taxes' in the Constitution. We are obliged, therefore, to resort to historical evidence, and to seek the

meaning of the works in the use and in the opinion of those whose relations to the Government, and means of knowledge, warranted them in speaking with authority."

After such historical references, the learned Chief Justice adds,

"This review shows that personal property, *contracts, occupations, and the like, have never been regarded by Congress as proper subjects of a direct tax.*"

In Knowlton *v.* Moore, 178 U. S. 41, 82, Mr. Justice White said:

"It is true that in the income-tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts, and excises, which are not the essential equivalent of a tax on property generally, real or personal solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall."

In Nicoll *v.* Ames, 173 U. S. 519, the tax was measured pre-
23 cisely by the sum realized on the sale, and fell on the vendor or vendee, under the same economic law that would govern in the case at bar, for the law does not change accordingly as the same shares may be sold, within, or without, an exchange. The curious investigator will find much instruction, and gather no little suspicion of the doctrines of political economists, as guides to constitutional interpretation, if he will consult Professor Seligman's article on the "Shifting and incidence of taxation" in the Publications of the American Economic Association, vol. 7, p. 6, *et seq.* The narration of the disagreements past and present of these theorists may leave him in doubt whether the usual tax assessed upon real property is not after all indirect.

At this point the history of the taxation of contracts will be considered, and proper inference drawn therefrom. It does not appear from the discussion of counsel, or the opinions in the Pollock case, that contracts were the subject of direct taxation prior to the adoption of the Constitution, nor that economists or jurists have characterized them as such. But shortly after the formation of the National Government a system of laying stamp duties upon such contracts was inaugurated.

By chapter 11, of the act of July 6, 1797, a stamp duty was placed on "bonds, bills, * * * foreign or inland bill of exchange, promissory note, or other note for the security of money, * * * any certificate of a share in any insurance company, or any certificate of a share in the Bank of the United States, or of any State, or other bank," (section 1). Chapter 53, of the act of August 2, 1813, similarly laid a tax on any bond, obligation or promissory note or notes not issued by any bank, companies, or banker, as aforesaid, discounted by any such bank, company, or banker, and on
24 any foreign or inland bill or bills of exchange above fifty dollars, and having one or more endorsers. Chapter 119, of the act of 1862, 12 Stat. at Large, 479, laid a tax upon bank checks, inland bills of exchange, drafts or orders for the payment of money, certificates of stock in any incorporated company, certificates of deposit, brokers' note, or memorandum of sale of any goods or merchandise, stocks, bonds, exchange, notes of hand, real estate, or property of any kind or description issued by brokers or persons acting as such, also, any "deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons by his, her, or their direction," also, any "lease, agreement, memorandum, or contract for the hire, use, or rent of any land, tenement, or portion thereof;" also, any "mortgage of lands, estate, or property, real or personal, heritable or movable whatsoever, where the same shall be made a security for the payment of any definite and certain sum of money, * * * ; also any conveyance of any lands, estate, or property, whatsoever, in trust to be sold or otherwise converted into money, which shall be intended only as security," &c.

Hence, it is seen that from an early period in the history of the national life, the power has been exercised of imposing a stamp duty upon personal obligations, certificates of stock of corporations, bonds, notes, and similar securities discounted at banks, and that at a later period, upon similar obligations, as well as upon conveyances, leases, mortgages, brokers' notes or memoranda of sale of stock, bonds, goods or merchandise. In all this there has been full acquiescence, and the power of the Government has been so thoroughly
25 recognized that in Knowlton *v.* Moore, 178 U. S. 41, 59, Mr. Justice White met an objection to the power of the Government to lay the taxes there involved, by saying:

"Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership, are subject more or less to State regulations, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, *even in the form of a stamp duty.* It cannot be doubted that the argument when reduced to its essence demonstrates its unsoundness, since it leads to the necessary conclusion that both the national and State governments are divested of those powers of taxation which from the foundation of the Government admittedly have belonged to them."

And well might the learned justice use such vigorous expression,

for stamp duties have been uniformly upheld. In Attorney General *v.* The Queen Ins. Co., 3 App. Cases, 1090, there is helpful discussion. The judgment of the privy council states:

"The single point to be decided upon this is whether a stamp act,—an act imposing a stamp on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt, in a court of law, if the stamp is not affixed,—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have; and in trying to find out their meaning we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the courts of law. Taken in either way there is a multitude of authorities to show that such a stamp imposed by the legislature is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice Taschereau (in the court below) in his elaborate judgment it is not necessary here to do more than refer to. But surely if one could have been found in favor of the appellants, it was the duty of the appellants to call their lordships' attention to it. No such case has been found. Their lordships, therefore, think they are warranted in assuming that no such case exists. As regards judicial interpretation, there are some English decisions, and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice Taschereau. There, again, they are all one way. They all treat stamps either as indirect taxation, or as not being direct taxation."

26 It will now be inquired, why a government that has power to lay an indirect tax upon a bond for the payment of money, may not lay the same tax upon the sale, that is, the act of transferring, or (and) the contract for transferring, the bond from one holder to another. What is there so inherently different in the contracts, as to enable a court to affirm the validity of a tax in one case, and to deny it in the other? Both are contracts; both are founded upon the same presumable consideration; both are business transactions, involving a contractual relation. If A issue his promissory note to B, for one thousand dollars, upon receiving that sum from B, and B agree to sell it to C, and accordingly does deliver it to C for one thousand dollars, upon what possible theory may the Federal Government place an unapportioned tax on the transaction between A and B, and be denied the ability to place a like tax on the transaction between B and C? The only conceivable answer is that the premise is false, but this would deny the power of Congress to lay the usual stamp tax on bills or notes. Passing to another assumption, if A, corporation, issue shares of stock to B for one thousand dollars, upon receipt of that sum, and B contract to sell them to C, and accordingly does deliver them to C for one thousand dollars,

upon what theory may the court affirm the power of the Federal Government to lay an unapportioned tax upon the transaction between A and B, and deny the power to lay a like tax upon the transaction between B and C? Is it because A is a corporation, and the tax is upon the corporate privilege? Does not the State give the privileges of the corporation to the stockholders, and if the Government may tax one privilege, may it not tax the other? Membership
27 in a corporation created by the State is an artificial privilege, similar, if not equal in degree, to that in an incorporated exchange, and the benefits of incorporation are the only advantages conferred by the State in the latter case, and to the opportunities afforded in both cases the National Government is an entire stranger. Again, if the Federal Government may lay an unapportioned tax upon indentures, whereby land is conveyed, why may not a like tax be placed upon contracts for sales of stock? One class relates to the sale of land, and the other to the sales of shares. There is no intrinsic difference. If the tax is on the certificate, so it is on the land; if one transfer is given the protection flowing from registration, so is the other; if the tax shifts in one case, in which case does it shift? One contract carries the land, the other muniments of titles to shares. It is difficult to understand why speculations or investments in stock should be exempted, and exchanges or sales of real property exposed, to a stamp tax. It is illogical to affirm that an unapportioned tax upon one contract, for example, for the payment of money, is valid, and a tax upon a contract to sell property is invalid. Both tax an obligation, one to pay money for property received or to be received, one to exchange property for money. Thus, by looking at the inner nature of the transactions, it is found that all have the essence of contracts, and that it is upon the contracts, as embodying a business transaction, that the tax is laid. Whether upon the sale of stock, the stamp is required to be placed upon the books of the company, where the transfer is shown, on the transfer certificate, or on a memorandum of sale, the tax is upon the business or act of making a legal contract, and the basis of the power is precisely the same as that which justifies a tax upon
28 bills, notes, or certificates of shares as originally issued, or contracts of conveyance. Congress may tax contracts in any form; it may tax contracts to buy certificates, or contracts to sell the same. As to such buying or selling, it was said in Treat *v.* White, 181 U. S., 264, 268, where this very statutory provision was involved, "The power of Congress in this direction is unlimited." In Knowlton *v.* Moore, Mr. Justice White adopted the following definition:

"Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange."

Thereupon it was demonstrated that an inheritance or legacy tax is laid upon the transmission of property. But, what is "transmission" but the transfer of title by one person to another, vesting possession at the time when the enjoyment of the first holder or owner ceases by the termination of his life. If the donor effected

the same distribution of his property in his lifetime, would not Congress have equal power to tax it? The assumed right of the Federal Government to lay death duties has no less remot- basis than the highly theoretical and practically unknown power of the State government to seize and confiscate the property of an unoffending citizen, who dies leaving heirs or donees. But the basic theory upon which such tax rests does not change the fact that it is imposed upon the transfer of the title of the property. The State has the power to regulate the use of property, and to direct under what reasonable limitations sales thereof shall be made. As a basis of taxation this power enures to Congress, quite as much as does the power to regulate successions. The conception that the State may theoretically confiscate property at the death of the owner, but may only regulate its use and sale during his life, points to a difference in degree of authority. The power of the State to regulate
29 is a true and genuine dominion; it is constantly exercised; it furnishes some real basis for taxation; the power to appropriate a decedent's property is the merest speculation, which no civilized State would ever venture to use.

The tax in question falls precisely within the definition stated by Mr. Justice White, because it relates to the act of sale, which act has two constituent elements, an agreement to sell, and consequent delivery. The two constitute an event upon which the tax takes effect. This event is a business transaction; as such Congress has taxed it, and as regards the power to do so, it is immaterial whether there is one event isolated, or many events aggregated, so as to constitute a person's uniform or usual vocation.

It may be of inconsiderable importance, whether an apportioned tax upon sales of property could be collected. Unlike a State, Congress, having in view the necessities of maintenance, must fix upon a gross sum and exactly apportion it. If this sum were laid upon the sales of property, the allotment to New York might be exceeded, while in Dakota a deficiency might arise. For the succeeding year the deficiency must necessarily be included in the gross sum to be raised, whereby it would result, that under a new apportionment the amount of deficiency in Dakota would be apportioned anew to the States and collected therefrom. Hence, it would happen that the States meeting their allotment might and probably would make up the deficiency of others, and the very theory of apportionment would be violated. The excess in New York and the deficiency in Dakota would raise equally embarrassing questions. While the question of inconvenience or impossibility of placing a tax upon sales of property does not prove that the tax is indirect, it
30 illustrates that it is based upon contingent events, and not upon property, and that in the uncertainties attending it, is unlike known direct taxes.

It is desirable to summarize the foregoing views. (1) The expressions in the cases, where no tax was valid, that a tax on vendors, or occupations, or shipping bills, was a forbidden tax on the commodities, would, if applied to instances, where the taxing power has been uniformly recognized, vitiate the same. (2) In whatever

form a tax is laid, its payment must be primarily from the tax-payer's property, and in this sense the same is the subject of the tax. (3) A statute providing for a direct tax with certainty burdens by lien, or generally, the tax-payer's property, and in theory appropriates *pro tanto* his income and incumbers his principal, while a statute providing for a tax on sales interrupts no enjoyment of property, makes no exaction from principal or income, beyond placing a tax upon a transaction attending the disposition of property, to wit, the contract for the sale and the act of transfer; but in the present case the certificates pass unaffected to the vendee. (4) The right to tax a pursuit, occupation, or business, involves the right to tax the same, in whatsoever limited degree it is adopted and followed, so that a right to tax one for carrying on the business of selling shares of stock involves the power to tax the sale of a single share of stock, that is, a tax on vendors may be limited to a single instance of vending. (5) The right to lay an unapportioned tax on sales is not limited to sales of commodities, whereby the tax may be shifted, in whole or in part, and the conflicting views of the economists should influence the legislature, and not constrain the courts. (6) The history of legislation shows similar instances where, after the adoption of the constitution, the power was exercised to tax contracts for the payment of money, and the transfer of property,
31 and the genuine nature of such contracts is the same as the subject of the act in question. The validity of such taxes is illustrated by their long and uniform enforcement by the court. (7) Taxes on sales or transfers of property are indirect within the holding of the Supreme Court. (8) The fact that the tax is difficult, if not impossible, of apportionment, indicates that it is based upon contingent events, and quite unlike the tax usually conceived as direct.

The defendant's contention seemingly is, that in the procession of constitutional interpretation, some reason has just now appeared, that should awaken the courts to a fundamental error, of which all men for a century have been profoundly unconscious. But such attention as is due the inquiry from the trial court confirms the wisdom of the past, and the power of Congress to lay the tax.

The demurrer should be overruled.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) U. S. circuit court.—United States *vs.* George C. Thomas.—Opinion overruling demurrer.—U. S. circuit court, southern district of New York, Filed Jan. 29, 1902, John A. Shields, clerk.

32 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms in the borough of Manhattan, in the city of New York, on Friday, the 31st day of January, in the year of our Lord one thousand nine hundred and two.

Present: The Honorable Edward B. Thomas, circuit judge.

UNITED STATES
vs.
GEORGE C. THOMAS.

This cause coming on to be heard upon a demurrer to the indictment heretofore filed, and having been argued pro and con in open court, on the 24th day of December, 1901, by Messrs. Pavey & Moore in behalf of the defendant and by William S. Ball, Esq., assistant attorney, in behalf of the United States, and the matters having been duly considered by the court, now on motion of Honorable Henry L. Burnett, United States attorney, it is

Ordered, adjudged and decreed that the said demurrer be and the same is hereby in all things overruled, and the defendant has leave to plead over on the first day of the next term of this court, beginning on the 12th day of March at 10½ o'clock in the forenoon.

EDWARD B. THOMAS, *U. S. J.*

33 (Endorsed:) U. S. circuit court.—United States *vs.* George C. Thomas.—Order overruling demurrer and leave to plead over.—U. S. circuit court, southern district of New York, Filed Jan. 31, 1902, John A. Shields, clerk.

34 Circuit Court of the United States, Southern District of New York, Criminal Branch.

THE UNITED STATES
vs.
GEORGE C. THOMAS.

The following pages "1" to "7" inclusive approved as containing a true and complete transcript of the proceedings and evidence had on the trial of the cause of The United States, plaintiff, against George C. Thomas, defendant, and hereby ordered on file as a part of the record in said cause.

EDWARD B. THOMAS, *U. S. J.*

Dated, March 25th, 1902.

35 Circuit Court of the United States, Southern District of New York, Criminal Branch.

THE UNITED STATES
vs.
GEORGE C. THOMAS. } Before Hon. E. B. Thomas, C. J., and a Jury.

NEW YORK, *March 12th*, 1902.

Appearances: Mr. Henry L. Burnett, U. S. attorney; Mr. W. S. Ball, assistant to U. S. attorney, for the Government; Hon. F. D. Pavey for the defendant.

The defendant asks the court to allow the defendant an exception to the order and judgment of the court entered on the 31st day of January, 1902, overruling the demurrer to the indictment filed in this case on the 10th day of December, 1901.

Exception granted.

The defendant pleads not guilty.

A jury having been called, accepted and sworn, the case was opened for the Government by Mr. Ball.

THOMAS DE W. SCOBLE, a witness called on behalf of the Government, being duly sworn, testifies as follows:

36 Examined by Mr. BALL:

Q. Are you acquainted with the defendant George C. Thomas?

A. Yes, sir.

Q. Did you ever have any dealings with him in regard to the purchase of any stocks of any kind?

A. Many times.

Q. Do you remember a transaction on the 15th of May, 1901, in which he sold you some Atchison preferred?

A. Yes, sir.

Q. Will you please look at this memorandum and state whether or not that is the memorandum of the sale in that case?

A. That is the memorandum, sir.

Q. Will you please state what that represents?

A. It represents 100 shares of the Atchison, Topeka & Santa Fe preferred which I bought of him at 92⅜.

Q. Is that the memorandum he turned over to you upon that transaction?

A. Yes, sir.

Counsel for the Government asks the court and jury to take notice that there are no stamps upon the memorandum.

Q. Is that memorandum in the shape now that it was when he passed it to you?

Counsel for the defendant objects to the question and suggests that the direct question be asked whether at the time that memorandum was delivered any stamps were on it, to which he will object.

Q. At the time that memorandum of sale was delivered to you were there any stamps upon it of any kind?

Defendant's counsel objects to the question as immaterial and irrelevant.

37 The defendant objects to the question as immaterial and irrelevant upon the ground that the failure or refusal of the defendant to affix stamps to a bill or memorandum of the sale of shares or certificates of stock does not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or cer

tificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and, more particularly, in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Objection overruled. Exception taken.

A. There were no stamps affixed to it.

Q. It is now in exactly the shape that it was when it was passed over to you?

A. Yes, sir.

Memorandum of sale offered in evidence and received as Exhibit 1.

38 Government rests.

Mr. PAVEY: We offer no evidence, and the defendant moves the court to direct the jury to return a verdict of not guilty forthwith, without retiring to consider their verdict, upon the ground that the facts are not controverted and the facts as proven on the trial of the case do not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Motion denied. Exception taken.

Mr. PAVEY: I ask the court to instruct the jury:

The defendant requests the court to instruct the jury that those portions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or

39 certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;"

and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

The COURT: I decline to so charge.

Exception taken.

Charge of the Court.

The COURT, THOMAS, *J.*:

GENTLEMEN OF THE JURY: The indictment charges the sale and transfer of stock from this defendant as indicated in the exhibit that is brought to your attention, without the placing thereon of the revenue stamps required by the statute which is known as the war-revenue statute, and that the defendant refrained from placing the said stamps upon such transfer for the purpose of evading payment of the tax which the statute requires to be paid under such circumstances.

The sole defence is that the statute itself is unconstitutional. That question has heretofore come before me upon a demurrer to this indictment, and I have fully examined the question and overruled the demurrer and held the statute to be constitutional,
40 so that you are to accept the statute as a valid law, and as the facts are uncontradicted it is for you to render a verdict in accordance with those facts.

I would say further that this proceeding is to a degree for the purpose of testing the validity of the law. That the defendant has been guilty of no wrong—has not refused to pay the tax except upon the ground that has been stated.

Unless there are further requests to charge it is unnecessary for me to say anything further to you.

Mr. PAVEY: I except to that portion of the charge in which you direct the jury that it must accept the statute in question as valid law, upon the ground that it is an improper and incorrect statement of the law applicable to the case at bar.

The COURT: Of course you may retire, if you desire to, gentlemen of the jury.

The FOREMAN: We do not think it necessary.

The jury rendered a verdict of "Guilty."

Mr. PAVEY: I would like to make a motion for a new trial.

The defendant moves the court to set aside the verdict of the jury and grant a new trial to the defendant upon the following grounds:

1. The court erred in overruling the objection of the defendant and allowing testimony to be taken and evidence to be introduced under the indictment in this case in reference to the failure or refusal of the defendant to affix stamps to the bill or memorandum of sale set forth in said indictment.

41 2. The court erred in overruling the motion of the defendant for a direction to the jury to bring in a verdict of not guilty.

3. The court erred in denying the request of the defendant to charge the jury.

The COURT: I deny the motion for a new trial.

Exception taken.

The COURT: I understand that he has paid all except with reference to this particular instance.

Mr. PAVEY: And it has been collected by distraint, levying upon funds in his office.

The COURT: Yes, but it is all paid up.

Mr. PAVEY: Yes, sir.

The COURT: And he is obeying the law since that time and paying under protest?

Mr. PAVEY: Entirely. I have a memorandum showing the entire preparation of the case.

The COURT: The sentence of the court is that the defendant be fined $500 and committed until the sum is paid, to the Ludlow Street jail, or until he is otherwise discharged by law.

Mr. PAVEY: Now I make my motion in arrest of judgment:

The defendant moves the court to arrest the judgment in the case upon the ground that the facts alleged in the indictment and proven on the trial do not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment
42 of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Motion denied. Exception taken.

Mr. PAVEY: I ask that the defendant be paroled in my custody until we arrange the matter.

The COURT: There is no objection to that, and a stay of 30 days. He may give his own recognizance for $1,000 and I stay the execution of the judgment for 30 days.

We agree that the foregoing pages numbered "1" to "7" inclusive contain a true and complete transcript of the proceedings and evidence had on the trial of the cause of The United States, plaintiff, against George C. Thomas, defendant, and consent that the same be ordered on file as part of the record in said cause.

Dated, March 24th, 1902.

HENRY L. BURNETT,
U. S. Attorney.

WM. S. BALL,
Assistant to United States Attorney for Plaintiff.

PAVEY AND MOORE,
Attorneys for Defendant.

43 (Endorsed:) Circuit court of the United States, southern district of New York.—United States *vs.* George C. Thomas.—Transcript of proceedings and evidence.—Pavey & Moore, attorneys for George C. Thomas, 32 Nassau street, New York city.—Due and timely service of a copy of the within transcript is hereby admitted. Dated March 25th, 1902. Henry L. Burnett, attorney for United States.—U. S. circuit court, southern district of New York, Filed Mar. 25, 1902, John A. Shields, clerk.

44 WEDNESDAY, *March 12th*, 1902.

Before Hon. Edward B. Thomas, Judge.

THE UNITED STATES *vs.* GEORGE C. THOMAS. } Act of March 2, 1901, Amending War-revenue Law of 1898, Schedule "A" One.

On motion of U. S. attorney, ordered trial, defendant present.

Jurors Sworn.

William S. Lalor	Alexander C. Milne
Nathan Morgenstern	Ernest J. Weil
Frank D. Woodward	Olney B. Dowd
Andrew P. Nahmens	Max G. Ernest
Charles W. Whitney	Stephen H. Tyng, Jr.
James D. Westervelt	Francis M. Baumann

Evidence in Behalf of Prosecution.

THOMAS D. SCOBLE, sworn.

Motion that court direct verdict of acquittal made by defendant's attorney. Denied.

Without summing up by counsel:

Charge is thereupon given by the court to the jury who say that they find the defendant guilty of the charges in the indictment contained, and so say they all.

45 Motion for new trial made by defendant's attorney and denied.

On motion of U. S. attorney ordered sentence.

The court thereupon proceeds to pass judgment and sentence the prisoner to pay a fine of five hundred dollars ($500), to stand committed until same is paid, or he shall be otherwise discharged according to law.

Motion in arrest of judgment made by defendant's attorney, thirty (30) days' stay granted in which to make and serve bill of exceptions. Defendant paroled in custody of attorney.

Ordered that defendant give $1,000 bail, pending appeal.

46 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Be it remembered that on this 13th day of March, in the year of our Lord one thousand nine hundred and two, before me, John A.

Shields, clerk of the circuit court of the United States, for the southern district of New York, personally came George C. Thomas, and acknowledged himself to owe to the United States of America the sum of one thousand dollars ($1,000) if default should be made in the conditions following, to wit:

Whereas on the 12th day of March, 1902, at a term of the circuit court of the United States held in and for the southern district of New York the above-named George C. Thomas was convicted on an indictment charging him with a violation of the war-revenue laws of the United States, and on the 12th day of March, 1902, the said court pronounced judgment and sentence against the above-named George C. Thomas, and

Whereas a writ of error from such judgment will be prayed for, and the said George C. Thomas having been allowed to give bail in the sum of one thousand dollars, pending the determination of such writ of error,

Now therefore, the condition of this recognizance is such that if upon the judgment of the supreme court upon said writ of error from the judgment of said circuit court as aforesaid the said George C. Thomas shall personally appear before said circuit court whenever and as soon as a judgment upon the mandate of the said supreme court shall be entered in said circuit court and then
47 and there surrender himself to the marshal of said circuit court and abide the order of the said circuit and supreme courts, then this recognizance will be void, otherwise to remain in full force and virtue.

GEO. C. THOMAS.

Acknowledged before me this 13th day of March, 1902.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George C. Thomas of 307 West 77th street in the city of New York, being duly sworn deposes and says that he is worth the sum of ten thousand dollars over and above all his just debts and liabilities.

GEO. C. THOMAS.

Sworn to before me this 13th day of March, 1902.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

(Endorsed:) Circuit court of the United States, southern district of New York.—The United States *vs.* George C. Thomas.—Recognizance.—U. S. circuit court, southern district of New York, Filed Mar. 13, 1902, John A. Shields, clerk.

48 Supreme Court of the United States.

UNITED STATES
vs.
GEORGE C. THOMAS.

Comes now the above-named defendant and plaintiff in error, George C. Thomas, by Pavey & Moore, his attorneys, and files the following assignment of errors upon which he will rely in his prosecution of the writ of error directed by the Supreme Court of the United States of America to the circuit court of the United States of America for the southern district of New York in the above-entitled cause.

I. The circuit court erred in overruling the demurrer of the defendant to the indictment filed in said cause on the 10th day of December, 1901.

II. The circuit court erred in allowing the admission of evidence of the absence of any stamps on the memorandum of sale in this cause at the time of its delivery against the objection of the defendant as follows:

Q. At the time that memorandum of sale was delivered to you were there any stamps upon it of any kind?

Defendant's counsel objects to the question as immaterial and irrelevant.

The defendant objects to the question as immaterial and irrelevant upon the ground that the failure or refusal of the defendant to affix stamps to a bill or memorandum of the sale of shares or certificates of stock does not constitute a crime against the peace and dignity of the United States nor an infringement of the laws
49 of the United States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and, more particularly, in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Objection overruled. Exception taken.

A. There were no stamps affixed to it.

III. The circuit court erred in denying the motion of the defendant that the court direct the jury to return a verdict of not guilty forthwith without retiring to consider their verdict. The said motion and the ruling were as follows:

Mr. PAVEY: We offer no evidence, and the defendant moves the court to direct the jury to return a verdict of not guilty forthwith, without retiring to consider their verdict, upon the ground that the facts are not controverted and the facts as proven on the trial of the case do not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United
50 States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Motion denied. Exception taken.

IV. The circuit court erred in declining to charge the jury as requested by the defendant. The said request and the ruling were as follows:

Mr. PAVEY: I ask the court to instruct the jury:

The defendant requests the court to instruct the jury that those portions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more
51 particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

The COURT: I decline to so charge.

Exception taken.

V. The circuit court erred in that portion of its charge to the jury in which it directed the jury that it must accept the statute in question as valid law. The portion of said charge in which the court erred and the exception taken are as follows:

The COURT, THOMAS, *J.*:

"* * * The sole defense is that the statute itself is unconstitutional. That question has heretofore come before me upon a demurrer to this indictment, and I have fully examined the question

and overruled the demurrer and held the statute to be constitutional, so that you are to accept the statute as a valid law, and as the facts are uncontradicted it is for you to render a verdict in accordance with those facts. * * *."

Mr. PAVEY: I except to that portion of the charge in which you direct the jury that it must accept the statute in question as valid law, upon the ground that it is an improper and incorrect statement of the law applicable to the case at bar.

VI. The circuit court erred in denying the motion of the
52 defendant for a new trial. The said motion and the ruling were as follows:

Mr. PAVEY: I would like to make a motion for a new trial.

The defendant moves the court to set aside the verdict of the jury and grant a new trial to the defendant upon the following grounds:

1. The court erred in overruling the objection of the defendant and allowing testimony to be taken and evidence to be introduced under the indictment in this case in reference to the failure or refusal of the defendant to affix stamps to the bill or memorandum of sale set forth in said indictment.

2. The court erred in overruling the motion of the defendant for a direction to the jury to bring in a verdict of not guilty.

3. The court erred in denying the request of the defendant to charge the jury.

The COURT: I deny the motion for a new trial.

Exception taken.

VII. The circuit court erred in denying the motion of the defendant in arrest of judgment. The said motion and the ruling were as follows:

Mr. PAVEY: Now I make the motion in arrest of judgment.

The defendant moves the court to arrest the judgment in the case upon the ground that the facts alleged in the indictment and proven on the trial do not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expend-
53 itures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Motion denied. Exception taken.

Wherefore, the said defendant and plaintiff in error prays that said judgment of the said circuit court of the United States of

America for the southern district of New York be reversed and such directions given that he be restored to all that which he has lost by reason of said judgment.

PAVEY AND MOORE,
Attorneys for Defendant and Plaintiff in Error,
32 Nassau Street, Borough of Manhattan, New York, N. Y.

54 (Endorsed:) Supreme Court of the United States.—United States *vs.* George C. Thomas.—Assignment of errors.—Pavey & Moore, attorneys for George C. Thomas.—Due and timely service of a copy of the within assignment is hereby admitted.—Dated March 25th, 1902, Henry L. Burnett, attorney for United States.—U. S. circuit court, southern district of New York, Filed Mar. 25, 1902, John A. Shields, clerk.

55 Circuit Court of the United States, Southern District of New York.

UNITED STATES
vs.
GEORGE C. THOMAS. } Bond for Damages and Costs.

Know all men by these presents, that I, George C. Thomas, am held and firmly bound unto the above-named United States in the sum of two hundred and fifty and $\frac{00}{100}$ dollars, to be paid to the said United States for the payment of which well and truly to be made, I bind myself, my heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with my seal and dated the 24th day of March in the year of our Lord nineteen hundred and two.

Whereas, the above-named George C. Thomas has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States, for the southern district of New York.

Now therefore, the condition of this obligation is such, that if the above-named George C. Thomas shall prosecute said writ of error to effect and answer all damages and costs if he fail to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GEO. C. THOMAS. [SEAL.]

Sealed and delivered, and taken and acknowledged, this 24th day of March, 1902, before me—

GEO. E. POULSON,
Notary Public. N. Y. Co.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

George C. Thomas being duly sworn, deposes and says that
56 he is worth the sum of five hundred dollars, over and above all his just debts and liabilities. GEO. C. THOMAS.

Sworn to before me this 24th day of March, 1902.

GEO. E. POULSON,
Notary Public, N. Y. Co.

(Endorsed:) Circuit court of the United States, southern district of New York.—United States *vs.* George C. Thomas.—Bond for damages and costs.—Pavey & Moore, attorneys for George C. Thomas, 32 Nassau St., New York city.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the plaintiff of the right at any time to examine the surety under oath, touching his assets, liabilities and financial condition generally, Edward B. Thomas, U. S. circuit judge.—U. S. circuit court, southern district of New York, Filed Mar. 25, 1902, John A. Shields, clerk.

57 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein George C. Thomas is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

[Seal of U. S. Circuit Court, South. Dist. New York.]

EDWARD B. THOMAS, *U. S. J.*

March 25th, 1902.

58 [Endorsed:] E. & A. B. 1923. Supreme Court of the United States. George C. Thomas, plaintiff in error, *vs.* United States, defendant in error. Citation to defendant in error. Pavey & Moore, attorneys for plaintiff in error, 32 Nassau street, borough of Manhattan, New York city. To —— ——, Esq., attorney for —. Due and timely service of a copy of the within citation is hereby admitted. Dated, March 25th, 1902. Henry L. Burnett, attorney for United States. U. S. circuit court southern district New York. Filed Mar. 25 1902 John A. Shields, clerk.

[Endorsed:] U. S. Supreme Court. George C. Thomas, pl'ff in error *vs.* The United States of America def't in error.

Endorsed on cover: File No. 18503. S. New York C. C. U. S. Term No., 650. George C. Thomas, plaintiff in error, *vs.* The United States. Filed April 18, 1902.